R KATHIRAVELU RAMASAMY A

v.

AMERICAN HOME ASSURANCE COMPANY MALAYSIA

COURT OF APPEAL, PUTRAJAYA B
JAMES FOONG JCA
SURIYADI HALIM OMAR JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: J-02-283-07]
8 APRIL 2008 C

ARBITRATION: *Agreement - Referral of dispute to arbitration - Whether want of an agreement - Whether dispute to be referred to court - Whether conditions for arbitration satisfied - Whether learned judge erred in dismissing application for arbitrator's appointment - Arbitration Act 1952, ss. 6, 12* D

In this appeal, the facts were that the appellant, pursuant to a fall that had injured him, made a claim on a personal accident insurance policy ('policy') provided by the respondent for the appellant. The respondent rejected the claim on the ground that the appellant failed to show that he suffered 'permanent disability' as defined by the policy. The appellant disagreed and sought to refer the matter for arbitration. He filed an originating summons ('OS') for an order to appoint an arbitrator to commence arbitration proceedings based on cl. 10 of the policy. Clause 10 of the policy stipulated the following: E F

> Any dispute, difference or question which may arise at any time hereafter between the Company and the Insured touching the true construction of the Policy or the rights or liabilities of the parties hereto shall be the decision of a single arbitrator of Malaysia to be agreed upon by the parties or in default of agreement for 14 days to be appointed in accordance with the subject to the provisions of the Arbitration Act 1952 or any statutory modification or re-enactment thereof for the time being in force. G H

The respondent, however, declined to have the matter arbitrated and relied on cl. 17 of the policy that stipulated the following:

> This policy shall be governed by and interpreted in accordance with Malaysian Law. The Malaysian Courts shall have exclusive jurisdiction. I

A The respondent claimed that the effect of cl. 17 was that it had the right to have the dispute litigated by the courts. The learned judge dismissed the appellant's OS primarily on the ground that there was want of an agreement to refer the matter for arbitration. Hence, the appellant's appeal.

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Held (allowing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

C **(1)** By virtue of cl. 10 of the policy, the parties agreed to resolve their differences by way of arbitration. A plain reading of that clause was more than sufficient for the court to arrive at that conclusion. The learned judge erred in fact and in law when he equated the respondent's objection to arbitration to that of disagreement to refer to arbitration under s. 6 of the Act despite the existence of cl. 10. It was exacerbated further when the learned judge construed that the parties agreed to submit their disputes to the courts. (para 7)

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(2) Clause 17 of the policy did not confer upon the court to decide on the parties' differences when they already consented to resolve them by way of arbitration. That policy merely read that the terms of the policy and the interpretation thereof was to be governed by Malaysian law with the Malaysian court having the exclusive power to interpret it. There was nothing ambiguous about that clause that required any special attention or permitted a construction favourable to the respondent (*contra proferentum* rule). Clauses 17 and 10 of the policy should be read harmoniously. (para 8)

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(3) The parties executed a valid arbitration agreement. A dispute, difference or question arose when the respondent rejected the appellant's claim. The essential conditions for arbitration were satisfied. Based on cl. 10 of the policy read with s. 12 of the Act, there was nothing left to do but to proceed with the agreed course of action. The subsequent action by the appellant, when he put his intention to refer the matter for arbitration, followed by the OS was merely an enforcement of his rights as agreed upon by the parties in cl. 10. When the conditions in cl. 10 were fulfilled, arbitration must follow. (para 9)

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Bahasa Malaysia *Translation Of Headnotes*

Dalam rayuan ini, faktanya adalah bahawa perayu telah membuat tuntutan di bawah polisi insurans kemalangan diri yang dikeluarkan oleh responden untuknya ('polisi') setelah mengalami kecederaan kerana terjatuh. Responden menolak tuntutan atas alasan bahawa perayu gagal menunjukkan bahawa beliau telah mengalami 'kecacatan kekal' seperti yang ditakrifkan oleh polisi. Perayu tidak bersetuju dan ingin merujuk halperkara kepada timbangtara. Berikutnya perayu memfail saman pemula ('SP') memohon perintah untuk melantik seorang penimbangtara bagi memulakan prosiding timbangtara di bawah fasal 10 polisi. Fasal 10 tersebut menyatakan seperti berikut:

> Mana-mana pertikaian, perselisihan atau persoalan yang mungkin berbangkit pada bila-bila masa selepas ini di antara Syarikat dan pengambil insurans yang menyentuhi pentafsiran sebenar Polisi atau hak-hak atau liabiliti pihak-pihak di sini hendaklah diputuskan oleh seorang penimbangtara Malaysia yang dipersetujui oleh pihak-pihak ataupun jika tiada persetujuan dicapai melalui penimbangtara yang dilantik dalam masa 14 hari menurut peruntukan-peruntukan Akta Timbangtara 1952 atau mana-mana pindaan statutori atau penggubalan semula peruntukan berkenaan yang sedang berkuatkuasa.

Responden bagaimanapun enggan merujuk halperkara kepada timbangtara dengan bergantung kepada fasal 17 polisi yang menyatakan seperti berikut:

> Polisi ini hendaklah dikawalselia oleh dan ditafsirkan mengikut undang-undang Malaysia. Mahkamah Malaysia hendaklah mempunyai bidangkuasa eksklusif.

Responden menyatakan bahawa kesan dari fasal 17 adalah bahawa ia berhak untuk membawa pertikaian ke mahkamah. Yang arif hakim menolak SP perayu secara pentingnya atas alasan bahawa tidak wujud persetujuan untuk merujuk halperkara kepada timbangtara. Perayu telah merayu.

Diputuskan (membenarkan rayuan)
Per Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan fasal 10 polisi, pihak-pihak bersetuju untuk menyelesaikan perselisihan melalui timbangtara. Membaca fasal tersebut secara biasa sudah lebih dari memadai bagi mahkamah

untuk mencapai keputusan ini. Yang arif hakim khilaf di sisi fakta dan undang-undang apabila menyamakan bantahan responden kepada timbangtara dengan ketidaksetujuan untuk merujuk kepada timbangtara di bawah s. 6 Akta walaupun dengan wujudnya fasal 10. Keadaan dikusutkan lagi dengan yang arif hakim mentafsir pihak-pihak sebagai bersetuju untuk merujuk pertikaian mereka ke mahkamah.

(2) Fasal 17 polisi tidak memberikan mahkamah hak untuk membuat keputusan terhadap pertikaian pihak-pihak apabila mereka sendiri bersetuju untuk menyelesaikannya melalui timbangtara. Polisi hanya menyatakan bahawa terma-terma polisi serta pentafsirannya hendaklah tertakluk kepada undang-undang Malaysia dengan mahkamah Malaysia mempunyai kuasa eksklusif untuk mentafsirkannya. Tiada apa-apa kekaburan mengenai fasal ini yang memerlukan pertimbangan istimewa atau menuntut kaedah pentafsiran yang berpihak kepada responden (kaedah *contra proferentum*). Fasal 17 dan 10 polisi harus dibaca secara berharmoni.

(3) Pihak-pihak telah memeterai satu perjanjian timbangtara yang sah. Pertikaian, perselisihan atau persoalan telah berbangkit bilamana responden menolak tuntutan perayu. Syarat-syarat penting bagi timbangtara telah pun dipenuhi. Berdasarkan fasal 10 polisi dibaca bersama s. 12 Akta, tiada apa-apa lagi yang harus dilakukan melainkan meneruskan dengan langkah yang sudah pun dipersetujui. Tindakan perayu kemudian dari itu, apabila menyatakan hasratnya untuk merujuk halperkara kepada timbangtara, dan diikuti dengan SP, hanyalah tindakan menguatkuasakan hak-haknya sepertimana yang dipersetujui oleh pihak-pihak melalui fasal 10. Sebaik syarat-syarat dalam fasal 10 dipenuhi, timbangtara hendaklah diadakan.

Case(s) referred to:

Chiew Swee Chai v. British American Insurance Co (M) Sdn Bhd [1986] 1 CLJ 408; [1986] CLJ (Rep) 316 HC ***(refd)***

Malaysian Steel Works Kuala Lumpur Sdn Bhd v. Kam Seng Machine Works PT Ltd [2003] 6 AMR 15 ***(refd)***

Salutary Avenue (M) Sdn Bhd v. Malaysian Shipyard and Engineering Sdn Bhd & Anor [1999] 7 CLJ 514 HC ***(refd)***

Willesford v. Watson [1873] 8 Ch App 473 ***(refd)***

Legislation referred to:

Arbitration Act 1952, ss. 6, 12

For the appellant - R Paramanandan; M/s C Sankaran & Co
For the respondent - TH Liew; M/s TH Liew & Partners

[Appeal from High Court, Johor Bahru; Originating Summons No: 24-3508-2006(4)]

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar JCA:

[1] On 31 March 2008 this panel heard the appeal and had allowed it with costs. The facts of the case are as follows. The defendant, hereinafter referred to as the respondent had provided a personal accident insurance cover for the plaintiff (hereinafter referred to as the appellant) under policy no. 403142 on terms and conditions set out in the policy. On 23 May 2001 the appellant had a fall which injured him and from this he subsequently made a claim on the policy. The respondent had rejected the claim, for reasons *inter alia*, on the ground that the appellant had failed to show that he suffered 'permanent disability" as defined by the policy. The appellant disagreed and sought to refer the matter to arbitration. He had filed an originating summons for an order to appoint one Dr. Clarence Edwin or someone suitable to act as an arbitrator, to carry out arbitration proceedings, as permitted by the insurance policy to resolve the dispute between them.

[2] The appellant contended that the application fell within the ambit of s. 12 of the Arbitration Act 1952. This provision reads as follows:

> In any of the following cases:
>
> (a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;
>
> (b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;

A (c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him;

B (d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy,

C any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire D or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

[3] The basis for the application was cl. 10 of the policy, which E reads:

Any dispute, difference or question which may arise at any time hereafter between the Company and the Insured touching the true construction of the Policy or the rights or liabilities of the parties hereto shall be the decision of a single arbitrator of Malaysia to F be agreed upon by the parties or in default of agreement for 14 days to be appointed in accordance with the subject to the provisions of the Arbitration Act 1952 or any statutory modification or re-enactment thereof for the time being in force.

[4] Regretfully the respondent had declined to have the matter G arbitrated and relied on cl. 17 of the policy which reads:

This policy shall be governed by and interpreted in accordance with Malaysian Law. The Malaysian Courts shall have exclusive jurisdiction.

H **[5]** The respondent had pleaded that the effect of cl. 17 was that it had the right to have the dispute litigated through the courts. The High Court agreed with this stance and opined that the appellant should have filed his claim in court if he felt aggrieved by the respondent's stance. The court concluded thus I as its jurisdiction to appoint an arbitrator was conditional on the parties' agreement to submit disputes to arbitration. The rejection

of the appellant's claim and the silence by the respondent to the referral to arbitration as submitted by parties, was evidence of that want of agreement to refer the matter for arbitration. The respondent's stance was in line with s. 6 of the Arbitration Act, which reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, **in respect of any matter agreed to be referred to arbitration,** any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings (emphasis added).

[6] The main grounds of the appeal reflected the grievances of the appellant which stated, amongst others, that the High Court Judge had erred:

1. in law and in fact in holding that the dispute between the appellant and the respondent could not be referred to arbitration regardless of cl. 10 of the policy;

2. in holding that there was no agreement between the appellant and respondent to refer disputes arising under the policy of insurance to arbitration;

3. in not holding that cl. 10 of the policy insurance constituted an arbitration agreement within the meaning or the Arbitration Act;

4. in holding that cl. 17 of the policy of insurance was an agreement to submit any dispute arising under the policy of insurance to court and that the court had exclusive jurisdiction over any such dispute;

5. in failing to hold that any ambiguity in the terms of a standard form policy of insurance must be resolved in favour of the insured applying the *contra proferentum* rule of interpretation; and

A 6. in holding that cl. 17 of the policy of insurance was a jurisdiction clause and a choice of law clause.

[7] This panel had unanimously allowed the appeal with costs with the deposit returned to the appellant. Our reasons were as
B follows. We found that by virtue of cl. 10 of the insurance policy the parties had agreed to resolve differences in respect of the policy of insurance between them by arbitration. A plain reading of that clause was more than sufficient for us to arrive at that conclusion. To have arrived at the decision that the objection by
C the respondent to arbitration, merely on the disagreement by the respondent whether the appellant suffered permanent injury or not, despite agreeing to resolving disputes under cl. 10, could be equated as disagreement to any referral to arbitration pursuant to s. 6 of the Arbitration Act, was an error of fact and law committed
D by the learned High Court judge. It was exacerbated further when the judge had construed that "In fact both parties have agreed to submit their disputes to the courts".

[8] We had decided that cl. 17 of the policy did not confer upon the court to decide on such differences when the parties had
E already consented to resolve them by arbitration. This policy merely read that the law governing the terms of the policy and the interpretation was to be governed by Malaysian law with the Malaysian court having the exclusive power to interpret it. There
F was nothing ambiguous about this clause that required any special attention or permitted a construction that should be favourable to the respondent (the *contra proferentum* rule). Clauses 17 and 10 could be read harmoniously.

[9] We had concluded that when the conditions in cl. 10 of the
G policy were fulfilled then arbitration must proceed. In other words "where the words of the policy are crystal clear … the sanctity of the contract should be upheld" (*Chiew Swee Chai v. British American Insurance Co. (M) Sdn. Bhd* [1986] 1 CLJ 408; [1986] CLJ (Rep) 316). To clarify this statement, for starters we were
H satisfied that a valid arbitration agreement had been executed by the contending parties. A dispute, difference or question had arisen when the respondent had rejected the claim followed by the disagreement by the appellant. With the essential conditions for arbitration satisfied, and reading the above cl. 10 with s. 12 of the
I Arbitration Act, what else was there left but to proceed with the

agreed course of action. The subsequent action by the appellant, when he put to notice his intention to refer the matter for arbitration, followed by the originating summons was merely an enforcement of his rights as agreed upon in cl. 10 (*Salutary Avenue (M) Sdn Bhd v. Malaysian Shipyard and Engineering Sdn Bhd & Anor* [1999] 7 CLJ 514, *Malaysian Steel Works Kuala Lumpur Sdn Bhd v. Kam Seng Machine Works P.T. Ltd* [2003] 6 AMR 15). To wind it up, in *Willesford v. Watson* [1873] 8 Ch. App 473, Lord Chancellor Selbourne had observed:

> If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed a *prima facie* duty is cast upon the courts to act upon such an agreement. The parties here have made that agreement. They probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against it, and they made it part of their mutual contract that these questions should be so determined. The plaintiffs cannot, therefore, be now heard to complain of that part if their contract is carried into effect.

[10] Founded on all the above reasons we had unanimously allowed the appeal with costs. The deposits were ordered to be returned to the appellant.

[11] My learned brothers Dato' James Foong Cheng Yuen JCA and Dato' Ahmad Haji Maarop JCA in principle have agreed to the draft.